FILE COPY

Office Supreme Court, U.S.
F
JAMES R. BR... Clerk

Supreme Court of the United States

No. 946

REPLY TO
BRIEF FOR THE UNITED STATES IN OPPOSITION
TO PETITION FOR CERTIORARI

INDEX

	PAGE
Reply to Brief for the United States in Opposition to Petition for Certiorari	1
Reply to Point I.	1
Reply to Point II.	7
Reply to Point III.	9
Reply to Point IV.	9
Conclusion	11

CITATIONS.

CASES:	
Bollenbach v. United States, 226 U.S. 607, 613	3
James v. United States, decided May 15, 1961, No. 63 October Term Supreme Court, 81 S. Ct. 1052, 1056, 1057	5
Stirone v. United States, 361 U.S. 212, 217	4
United States v. Pronger, 287 F. 2d 498, 500	3, 4
Constitution:	
Sixth Amendment to Constitution	10
Statutes:	
3500, Title 18, U.S.C.	9, 10
Rules:	
Rule 43, Federal Rules of Criminal Procedure	10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 946

LEONARD M. BERNARD and JAMES B. JACKSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

It is respectfully submitted that in its Brief in Opposition, the United States has undertaken to avoid answers to the questions presented, and seeks to convince the Court that in lieu of substantial questions presented by the Petition, the matters are really of no substance.

This desired result is attempted by misinterpreting the questions presented and distorting the facts upon which the petitioners' questions and petition are based.

In its characterization of the questions presented, the government states (Br. 1, 2) that the first question is whether the trial court committed prejudicial error in telling the jury, near the end of the trial, that "it" *might* consider all of the evidence as having been received against all defendants. (Emphasis supplied).

Examination of the record at R. 1816, shows that during the reception of government evidence, and near its close, the Court instructed the jury

> "You *are to consider* all of the admitted evidence offered by the Government, with the exception of the three specifications that I have specifically noted, as having been received against all of the Defendants. Thank you." (Emphasis supplied).

At page 7 of its Brief, the government confesses that this statement by the Court was not complete. Of course, it was more than not complete. It effectively implied to the jury that the Court now found a conspiracy to exist and was applying the law of agency, making each defendant responsible for all the acts and conversations of all of the others, with three stated exceptions.

There could be no misunderstanding, since this instruction during the taking of government evidence, occurred on June 9, 1959, in a trial begun on May 11, and the action was taken upon a motion made by the prosecutor *in the presence of the jury.* It is respectfully submitted that a reading of the proceeding at pages 1814 to 1817 of the defendants' Appendix, referred to by the government as R. for Record, will throw light upon the jury effect.

No instruction of the Court corrected, changed or modified the erroneous instruction given at R. 1816.

Even if the final charge of the Court on this subject; R. 1959, 1960, was conceded to be correct, which it is not, the conviction would then rest upon an equivocal instruction on a crucial issue contrary to the decision of this Court in *Bollenbach* v. *United States*, 226 U.S. 607, 613.

The government has not seen fit to discuss the propriety of the procedure other than to state that experienced trial attorneys could not have been taken by surprise, Br. 9. Suffice it to say that the petitioners' trial attorneys were not experienced in meeting the novel motion of the government or the erroneous and confusing charge of the Court as portrayed at R. 1814-17 and R. 1959, 1960.

The evidence showed that Bernard Bros. Inc., the corporation involved, had sold almost two million dollars worth of automobiles, services and supplies during the calendar year in question. Even under government evidence, taken at its best, 103 of more than 800 automobiles were involved in over-invoice transactions by various employees of the corporation. The government's proof showed $35,000.00 of over-invoice bonuses or gratuities given or paid by customers to respective individual employees. The Court's use of the phrase "a common plan or design to engage in a general course of corporate business transactions of the type shown by the evidence", R. 1959, 1960, was, under the facts, ambiguous and confusing and certainly did nothing to correct the error. This authorized the jury to find the defendants guilty of a criminal plan or design, indeed criminal conduct, by proof of engagement in a general course of corporate business." (See objection to instruction R. 1978).

The government's attempt to distinguish *United States* v. *Pronger*, 287 F. 2d 498 (CA 7), decided by the Court

below, subsequent to the decision in this case, is ineffectual. Contrary to the government's statement at pages 8 and 9 of its Brief, the Court's formal charge during the reception of evidence, and in the final charge, even more effectively than in the *Pronger* case, "had the effect of telling the jury that the • • • common design • • • had been proved" (287 F. 2d 500). In deciding the *Pronger* case, the Court below immediately following the statement above, relied upon by the government, said "If they (the words) did not have that effect, they merely succeeded in confusing the jury. In either event, Pronger was deprived of a fair trial by jury."

Again, in the case of *Stirone* v. *United States*, 361 U.S. 212, the government states that "Here, only a rule of evidence is involved" (Br. 9). It is respectfully submitted that in the *Stirone* case and in the case at bar, the basic issue was whether by the application of a rule of evidence, made by an instruction to the jury on how to consider admitted evidence, the charge of the Grand Jury was effectually amended, and it cannot be said with certainty that with a new basis for conviction added, the petitioners were convicted solely on the charge made in the indictment the Grand Jury returned. 361 U.S. 212, 217.

While the government dismisses (footnote Br. 10) as "frivolous", the claim that the trial court erred in refusing to instruct the jury to consider separately the guilt or innocence of each defendant, it supports the dismissal by reference without description, to the fact that alternative verdict forms were given to the Jurors. Of course no citation or argument is furnished to the effect that verdict forms are the equivalent of the requested instruction. This does not rebut the fact that the requested instruction was refused, R. 1932, Pet. 19, and

no explanation is offered for the conviction of Charles Bernard, under these instructions, when his lack of guilt was readily apparent to the Court of Appeals below. Contributory to his demonstrated and admitted erroneous conviction was the instruction to consider all evidence against all defendants and the refusal to instruct that guilt or innocence of each defendant should be considered separately.

The government footnote treatment (See footnote 3, Br. 9, 10) of the questionable character of the funds called "overages" is an attack upon the question as frivolous. In view of the highly important question of wilfulness involved in the commission of the felony charged in this case, a determination of the character of the overages was imperative. It is submitted that if the petitioners received the "overages" in belief of and claim of right, without mutual knowledge of individual activity or amounts, and did not believe the money to be that of the corporation, and the corporation so consensually treated it by never charging it, receiving it or claiming it, or demanding any accounting of it, then the employes' belief that it was the property of each respectively, was consistent with proved facts and belied "willfulness with evil intent and want of justification in view of all the circumstances". *James* v. *United States*, decided May 15, 1961, No. 63 October Term, Supreme Court, 81 S.Ct. 1052, 1056, 1057.

The Chief Justice, in his opinion in the *James* decision, 81 S. Ct. 1052, 1055, discussed income and its definition and said:

> "The language of § 22(a) of the 1939 Code, 'gains or profits and income derived from any source whatever,' and the more simplified language of § 61(a) of the 1954 Code, 'all income from whatever source

> derived,' has been held to encompass all 'accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.' *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431, 75 S. Ct. 473, 477, 99 L. Ed. 483. A gain 'constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it.' *Rutkin* v. *United States, supra*, 343 U.S. at page 137, 72 S. Ct. at page 575. Under these broad principles, we believe that petitioner's contention, that all unlawful gains are taxable except those resulting from embezzlement, should fail."

Bernard Bros. Inc., the corporation whose tax was the subject of the charged claim of attempted evasion, never acquired or claimed control or practical economic value of the funds in question.

It is respectfully submitted that there is a highly important question, crucial to proper determination of this case, as to whether these overages were not properly considered by the petitioners and their fellow employees as personal income, for which they were not accountable to the corporation, but upon which they were individually liable for personal income tax.

To frustrate consideration by this Court of the problems suggested by Petitioners' Questions No. 1 to 4 (Pet. 3, 4), the government has distorted the plain evidence in this case in its footnote at page 10 of its Brief, where it says,

> "The 'overages' were obviously a part of the consideration for the sale of the cars, and direct evidence showed that they were not retained by the employees but were turned over to Leonard Bernard, the president of the corporation (see *supra*, p. 6)."

This is a false conclusion and a false statement of the facts.

The truth is that with the exception of the testimony of Smith, who was excused from indictment, no employe, officer or agent of the company paid any part of his or her respective overage to any other person, under the evidence.

The government's position would be quite tenable if this false impression of the evidence was sustained by the record.

II.

The government's admission that the summary witness made some appraisal of the evidence, but not much, is significant that the principle urged by petitioners is established by the evidence, Br. 11. The degree of prejudice should be a matter for future argument.

However, the argument of the government, (Br. 10, 11), as its second point, begs or rather blithely ignores the principal error. At pages 1995 to 2003 of the certified Appendix, referred to by the government as "R." (Record), government exhibits 76A, 76B, 76C and 76D are reproduced and are certified to this Court.

Without any concession concerning the contents of the charts, that is, names and figures, admittedly arrived at by the witness by evaluation and selection of evidence, the Court is requested to consider the headings of the columns of figures on exhibits 76B, C, and D. Among these are "Purchase price to car dealer", "Amt. retained by Witness who Bgt. (bought) car", and the final invasion of the jury's province, "Understatement by Bernard Bros. Inc."

This last was, of course, a crucial issue and involved analysis of all of the factual and legal problems in the case.

No "guarding instructions" were given against this heading, and it is unlikely that any could be effective.

The purpose of the exhibits was to place a powerful and lingering argument that "overages" were corporate income before the jury in such fashion that the argument would continue its self-asserting force during jury deliberation.

From the facts proved, it is consistent to say that the petitioners and acquitted defendants, without formal consent of the corporation, but with actual freedom to accept, received the "overages" as additional compensation.

If these free lance bonus payments in 1948—an unusual economic period—(after O. P. A., but during a manufacturer-imposed and enforced car quota and suggested price period) were considered as consensually permitted reward, compensation, or bonus to employees, then, of course, they were deductible as compensation paid to experienced, scarce and valuable employees and officers.

The tax of the corporation would be unaffected. Of course, this could be considered untidy bookkeeping of a comparatively small gross item, but could not constitute wilful attempt to evade and defeat a corporate tax which would not accrue.

All of the evidence is consistent with this view of the actual treatment of the $35,000.00. Adding the $35,000.00 to the corporate reported $2,000,000.00, and subtracting it as compensation of employees and officers would not

affect any evasion or defeat of tax. Neither did ignoring it (the petitioners and acquitted defendants were not required to account) change corporate tax liability.

III.

Because the petitioners have used Nichols Motor Company records as the most flagrant example, the government has misunderstood the complaint concerning trial by unsworn false books in contrast to sworn witnesses.

Again the government by footnote (page 11 of its Brief), has given an erroneous impression of the evidence. The Nichols' books may have been regularly kept, but they were also falsely kept, for they did not mean what they said, (R. 568).

It is, however, the denial of memory by witnesses and the substitution of unsubstantiated and unsworn records as accusers that is petitioners' complaint.

IV.

The government has failed to comprehend the purpose and scope of the petitioners' complaint regarding the administration of Section 3500, Title 18, U.S.C., by the trial court and by the Court of Appeals in its characterization by presentation of questions presented. At page 2 of its Brief, the government states its question No. 4 as follows:

> "Whether the trial court erred in excising, as required by 18 U.S.C. 3500, those portions of a government witness' *testimony* on direct examination, before turning the statement over to defense counsel for cross-examination purposes." (Emphasis supplied).

Section 3500, Title 18, U.S.C., uses the phrase "relate to the subject matter of the testimony of the witness".

It is obvious that this is a substantially broader conception than that urged, or at least used, by the government in its Brief and discussion of this problem. The Court of Appeals below characterized the petitioners' contention in this regard as follows,

> "By their supplemental brief, defendants contend that the court's ruling denying them access to such reports prevented them, on cross-examination of Sharp, from exposing and developing any promise of leniency, or other relationship, between Sharp and the government, on the one hand, and Smith, Kazany and Gallagher, on the other." (Page 16A of Petition)

The exhibits and statements involved here are those of a government *agent* witness, and the statements in question are his written reports and statements concerning the investigation of the case which was the subject matter of his testimony. The government has carefully avoided the issue of constitutionality of the Jencks Act by misrepresentation of the petitioners' reasons for claimed unconstitutionality.

The petitioners do not contend that the Act is unconstitutional only becausc it restricts the defendant's right to examine. The petitioners earnestly contend that the Jencks Act deprives the defendant of his right to be present at all stages of the proceedings (Rule 43 Federal Rules of Criminal Procedure), and "to have the Assistance of Counsel for his defense". (Sixth Amendment to the Constitution of the United States).

Obviously, the defendant and his counsel are excluded from an *in camera* examination, and under the provisions and administration of the Act he is forever barred from knowing this part of the case against him, or the possible benefit of evidence to which he was denied access.

To state that the defendant was excluded from his examination of the document, of course, means that he is denied the right to have the "Assistance" of the educated eye of "Counsel" for examination of such documents so that relevancy, materiality or relationship to the subject matter of the testimony involved might be presented and considered intelligently. This is an ex parte and secret trial and appeal to the extent, however small, that the petitioners are deprived of seeing material submitted to their judges, and thus prevented from advocating any position concerning the substance of the agents' statements.

CONCLUSION.

For the reasons stated in the Petition and in this Reply, the writ of certiorari should be granted.

MAURICE J. WALSH
Attorney for Petitioners.